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MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-154

HOWARD PIPER, THOMAS C. PIPER and WILLIAM T. PIPER, JR.,
Petitioners,

v.

CHRIS-CRAFT INDUSTRIES, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS HOWARD PIPER, THOMAS C. PIPER AND WILLIAM T. PIPER, JR.

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Dated: September 26, 1973

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REPLY BRIEF FOR PETITIONERS HOWARD PIPER, THOMAS C. PIPER AND WILLIAM T. PIPER, JR.

This brief is submitted by petitioners Howard Piper, Thomas C. Piper and William T. Piper, Jr. ("the Pipers") in reply to the Brief for Respondent in Opposition submitted herein by Chris-Craft Industries, Inc. ("Chris-Craft") on September 18, 1973.

Respondent's brief, to the extent it deals with the Pipers, misstates their position in certain respects and ignores it in all others.

First, as a reading of their separate petition for certiorari demonstrates, the Pipers do not admit they violated Section 14(e) of the Securities Exchange Act and respondent's repeated assertions to the contrary are simply false (Respondent's brief, pp. 2, 12, 15, 16, 22, 23).

Second, respondent lumps the Pipers with the other defendants in a distorted, broad-brush treatment of the facts apparently to maximize their involvement. But liability has been imposed on the Pipers solely because of the two January 1969 statements. Chris-Craft acknowledges that the Pipers were not involved in the violation of Rule 10b-6 found below or in the other violation (the nondisclosure concerning the railroad in the Bangor Punta prospectus) found by the Court below (Respondent's brief, pp. 20-22, 9-11). These two transactions, each giving Bangor Punta about 7% of the outstanding stock of Piper Aircraft Corporation, are the transactions found by the Court of Appeals to have damaged Chris-Craft. The Court of Appeals majority nevertheless imposed joint and several liability on three members of incumbent management for statements issued during the January cash tender offer, which were not shown to have had any effect either on the results of that tender offer or on the contest between Bangor Punta and Chris-Craft months later. The inequity of that unprecedented result alone distinguishes this case from "a 'garden variety' case of stock fraud" and necessitates review by this Court.

As Judge Orrin Judd of the United States District Court for the Eastern District of New York pointed out in a recent book review (The Record of the Association of the Bar of the City of New York, Vol. 28, No. 6, p. 461, June 1973):

> "The *Chris-Craft* case is but one example of the dilemmas which management faces when a tender offer is

made. It may be subject to attack if it uses corporate funds unreasonably to perpetuate its own control; it may also be subject to attack if it unreasonably fails to defend against a tender offer which is detrimental to the corporation or its shareholders. The authors suggest that liability in either case should be restricted to cases of flagrant abuse."

Here, faced with these dilemmas, the Pipers acted. As three of the members of the Board of Directors of Piper Aircraft, they joined in the Board's determination to oppose the Chris-Craft raid and the issuance of statements in opposition thereto. The trial court found not only that the statements were issued in good faith and were not misleading but also that they were part of Piper management's "efforts to procure a better alternative" for all the corporation's shareholders—efforts which "were, in terms of price to tendering shareholders, successful" (Jt. App. G-12). The dissenting Court of Appeals judge found the statements caused no damage to Chris-Craft. Yet the Pipers have been found personally liable, essentially because the Court of Appeals majority (i) rewrote the facts as found by the trial court and (ii) directed personal liability by presuming causation where none existed in fact. The lack of any basis for finding causation sufficient to hold the Pipers liable is in effect conceded by Chris-Craft (Respondent's brief, pp. 35-36). Causation, Chris-Craft claims, "was a matter of simple arithmetic", yet the mathematics relied upon involve the two blocks of shares found to have been illegally acquired by Bangor Punta without any participation in the illegality by the Pipers.

The Pipers are not seeking a general review by this Court of all the antifraud provisions of the federal securities laws, as respondent would imply. The Pipers were found liable under Section 14(e), which is a new statute. Before it was passed, contestants for control generally had no

standing to sue under Section 10(b) and Rule 10b-5.* Incumbent management thus was not exposed to the risk of personal liability in most control contests. If Section 14(e) has changed this, we submit this Court should say so and enunciate rational tests for determining liability in the future. Letting personal liability rest on a 2 to 1 decision of a Court of Appeals, which is contrary to the findings of the trial court, is simply too insubstantial a guideline for the business community to follow in determining future conduct in light of this important new statute.

CONCLUSION

For the reasons stated in the Pipers' petition filed herein, a writ of certiorari should issue.

Respectfully submitted,

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* E.g., *Iroquois Industries, Inc.* v. *Syracuse China Corp.*, 417 F.2d 963, 969-70 (2d Cir. 1969); *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 940-41 (2d Cir. 1969).